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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DAVID SULLIVAN,

Defendant and Appellant.

D053447

(Super. Ct. No. SCD196072)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed in part, reversed in part.

A jury convicted Michael David Sullivan of second degree murder(Pen. Code § 187, subd. (a)), and found he used a deadly and dangerous weapon (a knife) in the commission of that offense (Pen. Code, § 12022, subd. (b)(1)). The court sentenced Sullivan to 16 years to life in state prison.<sup>1</sup>

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<sup>1</sup> Sullivan's sentence includes two concurrent 16-month terms for drug possession charges to which he pled guilty.

Sullivan contends (1) there is insufficient evidence to support his murder conviction; (2) the court prejudicially erred by allowing the prosecution to rebut the testimony of a defense character witness by referring to evidence that Sullivan was associated with the Hell's Angels motorcycle gang; (3) the court prejudicially erred by failing to inquire into reported jury misconduct; (4) he was denied his constitutional right to effective assistance of counsel when his attorney "opened the door" to evidence regarding the Hell's Angels and failed to object and request a hearing regarding jury misconduct; (5) the court prejudicially erred by giving the jury erroneous instructions on self defense and imperfect self defense; (6) he was denied his constitutional rights to jury trial and due process by the court's failure to respond to jury notes indicating the jury was hung, and by the denial of his motions for a mistrial and the dismissal of a hold-out juror; (7) the release of a juror without his presence denied him his right to be present during a critical stage of the proceedings; (8) he was denied his right to a unanimous jury verdict by the court's failure to adequately instruct the jury to begin deliberations anew after an alternate juror was substituted in place of a released juror; and (9) the cumulative effect of the asserted errors requires reversal. We conclude the court committed reversible error by allowing the prosecution's references to evidence connecting Sullivan to the Hell's Angels, and by failing to adequately instruct the jury to begin deliberations anew after substitution of an alternate juror. Accordingly, we reverse the murder conviction.

## FACTS

Viewed in the light most favorable to the judgment, the evidence at trial established the following. (*People v. Lewis* (2008) 43 Cal.4th 415, 432.) On the night of

January 7, 2006, Jonathan Lefler-Panela and his girlfriend, Nicole Hayes were in the bar of a restaurant called Sam's by the Sea (Sam's) with a few of Lefler-Panela's other friends. Hayes noticed Sullivan "mad-dogging" her — i.e., staring at her in a hostile way. Sullivan continued to stare at Hayes and Hayes returned "dirty looks" to Sullivan. Hayes asked Lefler-Panela why Sullivan was staring at them, and Lefler-Panela told her he "had problems with [Sullivan] back in the day" and not to worry about it.

Around closing time, Sullivan walked over to Lefler-Panela and Hayes, who were standing by a table, and brushed against Hayes as he walked past her. As Sullivan put on a jacket he picked up from the area behind the table, Hayes stood up, turned toward him and said, "What are you looking at?" Sullivan responded, "What the fuck are you looking at?" Hayes said, "It looks like you want to hit me." Sullivan said, "I don't hit bitches." Lefler-Panela then pushed Hayes aside and faced Sullivan, and Sullivan immediately punched him twice in the face. Bouncers working at the bar quickly separated Sullivan and Lefler-Panela, and one of the bouncers escorted Lefler-Panela and Hayes to an exit. Lefler-Panela did not throw a punch at Sullivan or otherwise fight back before he and Sullivan were separated.

After talking to the bouncer for about 20 to 30 seconds, Lefler-Panela and Hayes left the bar and walked around the corner of Sam's to the back parking lot where Lefler-Panela's truck was parked. Sullivan stayed in the bar. A witness testified that he appeared angry and agitated and that he said, "I'm going to stab him." He then pulled out a knife and released the blade with his thumb before putting it away. The witness heard an unidentified person say, "It's not worth it Sully."

Lefler-Panela was talking on his cell phone as he and Hayes walked towards his truck. As Lefler-Panela was about to enter the truck, Hayes saw Sullivan walk around the corner of the building. She told Lefler-Panela, whose back was to Sullivan, to "watch out" and "turn around." As soon as Lefler-Panela turned around, Sullivan began running toward him. Lefler-Panela took his shirt off and took a step or two toward Sullivan. The two collided and within seconds were on the ground, wrestling. Sullivan immediately began stabbing Lefler-Panela, and Hayes began kicking Sullivan, first in the back and then in the back of his head. About 35 seconds into the struggle, someone said, "He's got a knife," and about 5 seconds later, a bouncer stepped on Sullivan's arm, causing him to drop the knife. Sullivan got up and ran away as Lefler-Panela bled to death on the ground. The entire incident lasted less than a minute and Lefler-Panela never fought back or bit Sullivan.

Surveillance video from the bar shows Sullivan running into a waiting car after he punched Lefler-Panela in the bar. The video shows the car leaving the parking lot and Sullivan running back through the parking lot about a minute and a half later. The video establishes that Sullivan charged Lefler-Panela in the parking lot about four and a half minutes after he punched him in the bar.

Sullivan inflicted 17 stab wounds on Lefler-Panela. Two wounds to the left lung and one that penetrated the heart were potentially fatal. Sullivan suffered an injury to his nose, a slight scrape under his right eye, abrasions on his right knuckles, knee and elbow, and minor cuts or scratches on his left index and middle fingers as a result of the fight.

There were no bruises on Sullivan's body or injuries to the back of his head, and none of his injuries required stitches or a band-aid.

Lefler-Panela's former girlfriend Jacqueline Shackford was informed of Lefler-Panela's death shortly after he was killed. She knew Sullivan and telephoned him around 2:30 a.m. the night of the incident. She told him she heard there might have been a fight at Sam's and asked if he knew what happened. He said he did not, and that he had been in East County all day. She then told him she heard he was in the fight and had "[gotten] a little angry," and that the fight involved her ex-boyfriend who had just passed away. Sullivan said, "He died? He died?" She told him, "Everyone's saying you did it." He responded, "I didn't do it. I wasn't there."

At around 6:00 p.m. on January 8, 2006 (the day after Lefler-Panela's death), Sullivan turned himself in to the police accompanied by an attorney. There was a significant amount of dried blood on his nose and he told a doctor who examined him after he was taken into custody that his nose was bitten, he was kicked in the head, and that his knee, chest and finger hurt. The only treatment Sullivan received was having his nose wound cleaned with an antiseptic.

Dr. Norman Donald Sperber, a forensic odontologist examined Sullivan on January 9, 2006, to determine whether he had been bitten on the nose and whether the marks on his nose were caused by Lefler-Panela's teeth. Dr. Sperber testified that the marks did not resemble bite marks and could not have been caused by Lefler-Panela's teeth.

### Defense evidence

Dr. Marshall Brumer, an internal medicine and pulmonary specialist, testified that Sullivan was born with the severest grade of pectus excavatum, a condition where the breast bone and ribs are depressed into the chest, causing compression of the heart and lungs. A person with pectus excavatum will get short of breath with minimal exertion, and with continued exertion can become dizzy, suffer chest pain, and black out. Sullivan was medically discharged from the Marine Corps as a result of his pectus excavatum.

Sullivan testified as follows regarding the events leading to Lefler-Panela's death. He noticed Lefler-Panela and Hayes staring at him in a hostile way throughout the course of the evening at Sam's. At one point, Lefler-Panela put his hands around his own neck, as if he were choking himself, and Sullivan viewed that gesture as being directed at him.

After last call, Sullivan went to get his jacket, which was in an area of the bar where his friend Mike Wakely displayed and sold a line of clothing called "San Diego Built." He had to walk by Lefler-Panela and Hayes to get his jacket. He did not contact Hayes as he walked by her, but after he picked up his jacket, she got "in his face" and started cussing at him, calling him a "mother-fucker" and "bitch" and asking him, "What's your problem?" Lefler-Panela pushed Hayes aside, "got in [Sullivan's] face," and asked what his "fucking problem" was. Sullivan replied, "I don't know you or your girlfriend, and I don't have a problem with either one of you. I'm not looking for a fight." Lefler-Panela said, "I'll fuckin' kill you," at which point Sullivan threw the first punch at him. He punched Lefler-Panela because he knew a fight was imminent and he felt threatened.

After Sullivan got into his car and drove a short distance from Sam's, he stopped the car because he realized he had left his friend Mike Wakely drunk at the bar and had promised him a ride. He got out of the car and jogged back toward Sam's to get Wakely. As he rounded the corner and entered Sam's parking lot, he heard someone say, "There's that mother fucker," and saw Lefler-Panela remove his shirt.

Sullivan collided with Lefler-Panela in the parking lot and Lefler-Panela picked him up and slammed him to the ground, knocking the wind out of him. After they rolled a couple of times, Lefler-Panela was on top of him and someone started kicking him on his right side. Lefler-Panela bit his nose and he panicked. He felt he was being kicked all over his body by two people and was going to either pass out because he "couldn't get air," or be knocked out. As he struggled to get up, Lefler-Panela tried to pin him down and bit his nose a second time. At that point, which was about 45 seconds into the fight, he took out his knife, pressed the button to open it, and jabbed it into Lefler-Panela. He thought he stabbed Lefler-Panela five or six times. He was not trying to stab any particular part of the body or kill Lefler-Panela, he just wanted Lefler-Panela off him. Sullivan said, "Stop. Stop. And I'll stop." He thought Lefler-Panela had not been stabbed because he continued to fight, so he stabbed him again. The fight ended when someone stepped on his right arm and someone lifted Lefler-Panela off him. Sullivan ran to his car and heaved the knife on the way. He could see from his reflection in the car's mirror that he was covered with blood.

Several witnesses testified that they saw more than one person kicking or fighting with Sullivan. One testified that he saw Lefler-Panela and a younger male trying to pin

down Sullivan and knee him. Another testified that in addition to Lefler-Panela and Hayes, he saw two males attack Sullivan — a "guy from the back" who "had just taken a boot to him" and another who ran up and hit and kicked him. Another witness testified that he saw Sullivan "getting kicked by at least one female and at least two males in addition to the guy he was fighting originally."

Dr. Gregory Stephen Golden, a forensic dentist who examined photographs of Sullivan's nose, testified that he initially thought the wound on Sullivan's nose looked like a bite mark, but when he saw a close up of the nose after the blood had been cleaned off it, he thought it looked more like a finger-nail type laceration. However, he concluded it was a bite mark when he learned that Sullivan could not be ruled out as a contributor to DNA in a sample taken from Lefler-Panela's teeth.

## DISCUSSION

### *I. Hell's Angels References*

Sullivan contends the court prejudicially erred by allowing the prosecution to rebut a defense witness's testimony about his good character with questions indicating he was fascinated by the Hell's Angels motorcycle gang, including one that referenced a book entitled "I Was A Killer for the Hell's Angels" found in the trunk of Sullivan's car. The prosecution filed a pretrial motion to admit evidence of Sullivan's "affiliation" with the Hell's Angels, arguing the evidence was relevant to prove motive or intent. The prosecution also argued the evidence would be admissible to rebut evidence of Sullivan's good character and propensity for peacefulness. Sullivan filed a motion in limine to exclude any reference or mention by the prosecution of his affiliation with the Hell's



Angels, the book found in his trunk, or clothing and other possessions indicating a fascination with the Hell's Angels.

At the hearing on the motions, the prosecution admitted Sullivan was not a member, associate, or even a prospect of the Hell's Angels. The prosecution referred to him as a "wannabe" and a person who "is in his own private Disneyland, in which he is 100 percent obsessed with the Hell's Angels." The court granted Sullivan's motion to exclude the Hell's Angels references. The court later commented, "I don't want the jury to decide on the basis of tattoos or wannabe Hell's Angel or don't wanna be a Hell's Angel or mechanic for motorcycles. I want them to decide on the choices for behavior for both these young men."

The prosecution reaffirmed its position that the Hell's Angels evidence would be relevant to rebut character evidence that Sullivan was "a peaceful guy." Later in the trial, the court heard extensive argument on that point outside the presence of the jury. Defense counsel noted the prosecution was "trying to tell the jury he's fascinated with them; not that he is one. He's fascinated with the Hell's Angels. Is that a fair question on cross-examination of a character witness? I say no."

The court said, "I think it's very problematic to inject the Hell's Angels stuff. I think it's very prejudicial, and I don't know that it helps all that much. . . . [¶] . . . Under

[Evidence Code section] 352<sup>2</sup>] I've got to be very careful about just having this jury see him for the way you would want them to see him." The court later added, "[T]o just get within this trial the fact that he may . . . know some Hell's Angels, I don't know that the probative value is that great. I mean, I know the prejudicial effect is great. I know that."

The last witness the defense called was Emily Chang, a television news reporter and friend of Sullivan. On direct examination, Chang testified Sullivan was a truthful person. On recross-examination, the prosecution referred to a photograph of Sullivan unclothed from the waist up and asked, "Is that the person we're talking about, Mr. Sullivan?" Chang answered, "Yes."

On re-redirect examination, defense counsel asked Chang, "I guess — I guess the question is, is this guy full of tattoos, is he this big, bad, ugly, mean, dishonest person?" Chang answered, "He's not. Not at all. He's one of the gentlest, nicest, most loving people I know."

The prosecution then argued that defense counsel had opened the door to the Hell's Angels evidence as rebuttal evidence to Chang's opinion testimony about Sullivan's good character. The court agreed and ruled that the prosecution could refer to all of the evidence showing Sullivan's fascination with the Hell's Angels and ask Chang if it changed her opinion of Sullivan. After defense counsel unsuccessfully moved to strike

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<sup>2</sup> Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Chang's door-opening testimony, the court allowed the prosecution to ask the following questions regarding the Hell's Angels evidence in re-recross examination of Chang, over defense counsel's objection under Evidence Code section 352:

"Q. Well, would your opinion remain the same about Mr. Sullivan being a gentle person if you were told that . . . on several occasions he's worn clothing that indicates support for the Hell's Angels motorcycle gang?

"A. My opinion would remain the same.

"[¶] . . . [¶]

"Q. Okay. Well, if you were told that on times that he's been contacted, such as the 4th of July of 2005, the company that he was keeping were people who were known prospects, slash, associates of the Hell's Angels motorcycle[] gang, would your opinion about him being a gentle guy still remain the same?

"A. Yes.

"[¶] . . . [¶]

"Q. If I were to tell you that he actually came to court, you know, like, one day and was in the company of a Hell's Angel . . . associate who was on trial for another crime, would that keep your opinion the same?

"A. Yes.

"Q. If I were to tell you that, actually, when he surrendered himself he had a shirt on, inside out, that indicated, 'I support the San Diego Hell's Angels,' would your opinion about him being a gentle person remain the same?

"A. I know Michael –

"[¶] . . . [¶]

"Q. But would your opinion of him remain the same?

"[A]. My opinion would remain the same.

"[¶] . . . [¶]

"Q. If I were to ask you if, when he surrendered himself, he had a ring on that . . . had the numbers . . . 8-1 on the ring, indicating support for the Hell's Angels motorcycle gang, would you still, you know, have the opinion that he's a gentle individual?

"A. Yes.

"Q. If I were to tell you that inside his car there was a book that he had that was — in addition to all those other things said — a book that was titled, "I Was A Killer For the Hell's Angels," would your opinion about him reading something like that, in conjunction with the clothing . . .

"[¶] . . . [¶]

"Q. The fact that the book, in conjunction with all those other things taken together, would you still have an opinion that Mr. Sullivan is a gentle person?

"A. Yes."

Evidence Code section 1102 provides: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of

his reputation is not made inadmissible by Section 1101<sup>3</sup>] if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)." Thus, "[a] defendant may introduce opinion evidence of his or her character to show a nondisposition to commit an offense." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1118.) "Lay opinion testimony is admissible under [Evidence Code] section 1102 when it is based on the witness's personal observation of the defendant's course of behavior." (*People v. Felix* (1999) 70 Cal.App.4th 426, 430.)

"[W]hen the defendant . . . has injected the issue of his *good moral character* into the case by direct testimony, the prosecution may rebut by introducing evidence of the defendant's bad moral character." (*People v. Wagner* (1975) 13 Cal.3d 612, 618.)

"When a defense witness gives character testimony, the prosecutor may inquire of the witness whether he or she has heard of acts or conduct by the defendant inconsistent with that testimony, so long as the prosecutor has a good faith belief that such acts or conduct

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<sup>3</sup> Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

actually took place." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1170.) Under Evidence Code section 352, the trial court has discretion to exclude this type of cross-examination of a character witness if "the[ ] questions and answers would create a substantial danger of undue prejudice to the defendant." (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 954.)

"Generally, the scope of bad character evidence offered in rebuttal must relate directly to the particular character trait concerning which the defendant has presented evidence." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1072.) When the defendant's good character evidence is broad and general and not "limited to any singular incident, personality trait, or aspect of his background," (*ibid.*) the prosecution may introduce a broad scope of evidence that directly relates to the general picture of good character presented by the defendant. (*Ibid.*)

Where, as here, the prosecution seeks to rebut evidence of the defendant's good character with evidence associating the defendant with a criminal gang, additional principles come into play. "California courts have long recognized the potentially prejudicial effect of gang membership." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) The California Supreme Court has "recognized that admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) Because of the highly inflammatory impact of gang membership evidence, the Supreme Court has condemned the introduction of such evidence offered by the prosecution if it is only tangentially relevant.

(*People v. Cox* (1991) 53 Cal.3d 618, 660, disapproved on another point in *People v. Poolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [In cases not involving a gang enhancement, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal."].)<sup>4</sup>

"Thus, as [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, *other than character evidence*, is not more prejudicial than probative and is not cumulative." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223, italics added.) Even if such evidence is relevant, however,

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<sup>4</sup> In 1968 the Third District Court of Appeal took judicial notice of the fact that "[m]ost of the northern California public regard the Hell's Angels or members of a motorcyclists' organization of that name with distaste . . . ." (*People v. McKee* (1968) 265 Cal.App.2d 53, 59.) The *McKee* court noted that in a prior case, it had expressed concern about the prosecutor's references to the defendant's membership in the Hell's Angels and had stated: " 'At several points [the prosecutor] indicated the group's 'infamous reputation' and 'potential for violence.' Under some circumstances statements of this sort would be prejudicial, arousing bias and tending to judgments of guilt by association.' " (*Id.* at p. 59, fn. 6.)

In *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 770, fn. 16, the Court of Appeal noted: "A report on the Hell's Angels prepared by the California Department of Justice in 1965 describes numerous 'Hoodlum Activities' attributed to club members by law enforcement agencies, and their 'Crime Characteristics[.]' . . . Hunter S. Thompson, the author of a much more penetrating study of the Hell's Angels, concludes that '[t]he Hell's Angels are not visionaries, but diehards, and if they are the forerunners or the vanguard of anything it is not the "moral revolution" in vogue on college campuses [in the 1960s], but a fast-growing legion of young unemployables whose untapped energy will inevitably find the same kind of destructive outlet that "outlaws" like the Hell's Angels have been finding for years.' [Citation.] According to Thompson, the insignia of the Hell's Angel, and particularly their 'swastika fetish,' 'is no more than an antisocial joke, a guaranteed gimmick to bug the squares . . . .' [Citation.] The '1 %-er' badge Hell's Angels commonly wear 'means that they are proud to be part of the alleged one percent of bike riders whom the American Motorcycle Association refuses to claim.' "

trial courts should carefully scrutinize it before admitting it because it may have a highly inflammatory impact on the jury. (*People v. Williams, supra*, 16 Cal.4th at p. 193.)

We review a trial court's evidentiary rulings under Evidence Code sections 352, 1101, and 1102 for abuse of discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 437.) "The evidence barred by Evidence Code section 352 is evidence that uniquely causes the jury to form an emotion-based bias against a party and that has very little bearing on the issues of the case." (*People v. Thornton* (2007) 41 Cal.4th 391, 427.) " '[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

"When a[n Evidence Code] section 352 objection is raised, the trial court 'must weigh the admission of [the challenged] evidence carefully in terms of whether the probative value of the evidence is greater than the potentially prejudicial effect its admission would have on the defense.' [Citation.] If the prejudicial effect outweighs the probative value, the trial court should exclude the evidence. '[T]he fundamental rule [is] that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted.' " (*People v. Cardenas* (1982) 31 Cal.3d 897, 904.)

We conclude the court abused its discretion in allowing the prosecution to refer to evidence of Sullivan's fascination with the Hell's Angels to rebut Chang's testimony about



his good character. The problem with allowing the references to that evidence as rebuttal to Sullivan's character evidence is that they did not show any particular bad act or misconduct by Sullivan, but rather had the effect of "guilt-by-association evidence" — i.e., evidence raising an inference that Sullivan is a person of bad character or criminal disposition because of his association or, more accurately, his mere *fascination* with the Hell's Angels.<sup>5</sup>

Guilt by association offends state constitutional principles. (*People v. Galloway* (1979) 100 Cal.App.3d 551, 563; *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071-1072 [Profile evidence improperly invites a finding of guilt by association and undermines a defendant's right to a fair trial.]; (*People v. Young* (1978) 85 Cal.App.3d 594, 603, fn. 3 [Guilt by association is thoroughly discredited in American jurisprudence.]; see also *United States v. Polasek* (5th Cir. 1998) 162 F.3d 878, 884 ["[T]he government may not attempt to prove a defendant's guilt by showing that she associates with 'unsavory characters.' "]; *United States v. McCall* (5th Cir. 2008) 553 F.3d 821, 826 ["An associate's attendance at a 'friend's' criminal trial, which is a constitutional right enjoyed by savory and unsavory characters alike, is no better evidence of a defendant's guilt."].) Where, as here, evidence of mere association or fascination with a

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<sup>5</sup> The evidence did not show Sullivan associated with actual members of the Hell's Angels; it showed he had an interest or fascination with the gang and appeared to be a Hell's Angel's "wannabe." The only evidence of *association* concerning the Hell's Angels was the prosecutor's reference to Sullivan's keeping company with "people who were known prospects, slash, associates of the Hell's angels," and reference to his coming to court "in the company of a Hell's Angel . . . associate [who] was on trial for another crime."

gang, in contrast to evidence of *membership* in a gang, is offered only to show a defendant's bad character, courts should exercise great caution in allowing it because of the strong likelihood that its prejudicial effect of inviting a finding of guilt by association will outweigh its probative value on the issue of the defendant's character.

Here, the Hell's Angels evidence referenced by the prosecution was only tangentially relevant to rebut Chang's opinion testimony about Sullivan's good character, but was highly inflammatory because it invoked the image that Sullivan had a criminal disposition and propensity to commit violent crime to emulate the Hell's Angels. The prosecution's reference to Sullivan's possessing the book entitled *I Was A Killer For the Hell's Angels* was particularly inflammatory because it suggested he was predisposed to kill in emulation of the gang. The rebuttal questions connecting Sullivan to the Hell's Angel's "allowed . . . unreasonable inferences to be made by the trier of fact that [Sullivan] was guilty of [murder] on the theory of 'guilt by association.' " (*People v. Perez* (1981) 114 Cal.App.3d 470, 477.) Therefore, the court abused its discretion in allowing them.

The question remains whether the admission of the Hell's Angels evidence was prejudicial. The erroneous admission of evidence warrants reversal of a judgment only if the reviewing court concludes it is reasonably probable that a more favorable result would have been reached in the absence of the error. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658-659; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) The California Supreme Court has "made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract*

*possibility.*" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

We conclude there is a reasonable chance Sullivan would have obtained a more favorable outcome had the court not allowed the prosecution to rebut Chang's testimony about Sullivan's good character with questions connecting him to the Hell's Angels. The jury deliberated for 12 days over a 21-day period. The California Supreme Court has held that "jury deliberations of almost six hours are an indication that the issue of guilt is not 'open and shut' and strongly suggest that errors in the admission of evidence are prejudicial." (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.) Other indications that this was not an "open and shut" case include the facts that the jury rejected the theory of first degree murder, requested a read back of Sullivan's testimony about his fight with Lefler-Panela, and sent multiple requests for clarification of jury instructions regarding the defense theories of self defense and imperfect self defense. In addition, two juror notes sent out during deliberations informed the court that the jury was hung.

The Hell's Angels references support the inference that Sullivan had a violent and criminal disposition and therefore was acting with criminal intent when he fought Lefler-Panela. Had the court not allowed those references, the jury might well have found Sullivan acted in either self defense or imperfect self defense. Accordingly, allowing the Hell's Angels references was prejudicial error requiring reversal of the murder conviction.

## II. *Instruction to Jury Regarding Deliberations After Substitution of an Alternate Juror*

Sullivan contends he was deprived of his right to a unanimous jury verdict when the trial court failed to adequately convey the jury's duty to disregard all prior deliberations and start deliberations anew after substitution of an alternate juror.

After ten days of jury deliberations, the court received a letter dated July 16, 2007, from Juror No. 6 stating he would be unable to serve on the jury after July 20 because of family obligations. The juror reminded the court that he had questioned whether he was a good candidate for jury service because he was the only family member available to help his incapacitated wife and mother, and the court had assured him there would be alternate jurors available to replace him in the event of a family emergency. On July 19, 2007, the court excused Juror No. 6 after confirming that he wanted to be excused.<sup>6</sup>

After excusing Juror No. 6, the court addressed the remaining jurors, except for Juror No. 11, who was absent that day due to a family emergency. In relevant part, the court stated: "[W]hen the new member of the jury comes in . . . you have to start deliberations all over again. That doesn't mean you have to go over every little detail. You can start fresh though by not telling them what you have done. Just start fresh as though you were first deliberating. See how much you have to go back over. You may not have to replot everything. I don't know. That's up to you. You can't say we've

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<sup>6</sup> The previous day (July 18, 2007), the court received a note from Juror No. 4 complaining that Juror No. 6 was not deliberating in good faith. The court considered inquiring into that matter, but noted it would be moot if Juror No. 6 were excused for family reasons.

settled this. We've settled that. This is a fact. You can't do this. That person is a new member. It's a new jury. A brand new jury. [¶] You can probably expedite it in some fashion. It's a new jury. Therefore, a new deliberation. That's in the hands of you for purposes and the rest of you."

After the court replaced Juror No. 6 with an alternate juror, the court told the jury: "We're going to start all over again. Okay? And I've already clued in your foreperson, Juror No. 4. And I told her if they want to start with a new leader, that's fine. If you want to draft her to go on with her responsibilities, that's fine. [¶] But you're a new jury. You're a new jury. So you have to begin at the beginning. And you can't tell Juror No. 6 you've already settled some issues, because you haven't. Not as far as he's concerned. So if you want to keep your foreperson, that's great. If you don't, collect another one if you so desire and get back to work. And we'll see you when we see you." The reconstituted jury reached a verdict after about two and a half hours of deliberation.<sup>7</sup>

In *People v. Collins* (1976) 17 Cal.3d 687 (*Collins*), the California Supreme Court held that the right to trial by jury under the California Constitution (Cal.Const., art. I, § 16) includes "the requirements that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous." (*Collins, supra*, 17 Cal.3d at p. 693.) The Supreme

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<sup>7</sup> Defense counsel moved for a mistrial "in light of the fact that they've been deliberating almost steadily since June 29th with the original jury, and now they were ordered by your honor and the law to begin from scratch, renewed deliberations[.] [I]t seems that this is not an appropriate resolution . . . in such a short period of time." Alternatively, counsel made a "secondary motion" for an instruction to the jury to reconsider the time that they've deliberated this with the newly constituted jury, in light of the original deliberations . . . ." The court denied "the motion."

Court noted those requirements are part of the broader right that " requires each juror to have engaged in all of the jury's deliberations. . . . The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean that a defendant may not be convicted except by 12 jurors who have heard all the evidence and argument and who together have deliberated to unanimity." (*Ibid.*)

*Collins* construed Penal Code section 1089, which provides for substitution of alternate jurors,<sup>8</sup> to require "that deliberations begin anew when a substitution is made after final submission to the jury. This will insure that each of the 12 jurors reaching the

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<sup>8</sup> Penal Code section 1089 provides, in relevant part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefore, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors."

verdict has fully participated in the deliberations, just as each had observed and heard all proceedings in the case." (*Collins, supra*, 17 Cal.3d at p. 694.) Accordingly, *Collins* construed "[Penal Code] section 1089 to provide that the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had."<sup>9</sup> (*Collins, supra*, 17 Cal.3d at p. 694.)

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<sup>9</sup> In accordance with *Collins, supra*, 17 Cal.3d at p. 694, CALCRIM No. 3575 reads: "One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. [¶] Do not consider this substitution for any purpose. [¶] The alternate juror must participate fully in the deliberations that lead to any verdict. The People and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place. [¶] Now, please return to the jury room and start your deliberations from the beginning."

Similarly, CALJIC No. 17.51 reads: " Members of the Jury:

"[T]he substance of this instruction is mandatory when an alternate is substituted into a jury after deliberations have begun." (*People v. Renteria* (2001) 93 Cal.App.4th 552, 557, 559 (*Renteria*)). The failure to properly instruct the jury after substitution of an alternate juror is error under the state, rather than federal, constitution. Consequently, it is not per se reversible error, but is subject to the prejudicial error test set forth in *Watson*, *supra*, 46 Cal.2d at p. 836. (*Collins*, *supra*, 17 Cal.3d at p. 697, fn. 5.)

We agree with Sullivan that the court did not properly instruct the jury after substituting an alternate juror in place of Juror No. 6. In *People v. Martinez* (1984) 159 Cal.App.3d 661, 664 (*Martinez*), the Court of Appeal noted that *Collins* construed section 1089 to require the trial to " 'instruct the jury to *set aside and disregard all past deliberations* and begin deliberating anew.' " (*Martinez*, *supra*, 159 Cal.App.3d at p. 664, italics added by *Martinez*.) After substituting an alternate juror, the trial court in *Martinez* instructed the jury to "start over" with the new juror, but did not instruct the jury to set aside and disregard all past deliberations. The Court of Appeal deemed that omission to be "crucial error." (*Id.* at p. 665.)

The trial court here committed the same crucial error by neglecting to instruct the jury to set aside and disregard all past deliberations. Moreover, the court exacerbated the

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A juror has been replaced by an alternate juror. You must not consider this fact for any purpose. [¶] The People and [the] defendant[s] have the right to a verdict reached only after full participation of the twelve jurors who return the verdict. [¶] This right may be assured only if you begin your deliberations again from the beginning. [¶] You must therefore set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place. [¶] You shall now retire to begin anew your deliberations in accordance with all the instructions previously given."



error and undermined its instruction to "start all over again" by telling 10 members of the jury that when they resumed deliberations with the new juror, they would not have to "go over every little detail," "may not have to replot everything," and could "probably expedite [deliberations] in some fashion." These instructions invited the reconstituted jury to bring the new juror "up to speed" on prior deliberations rather than starting deliberations anew and, therefore, were directly contrary to the mandatory instruction to set aside and disregard *all past deliberations*. (See *People v. Odle* (1988) 45 Cal.3d 386, 405, abrogated in part on another ground as stated in *People v. Prieto* (2003) 30 Cal.4th 226, 256 [Instruction that reconstituted jury should start from scratch so substituted alternate "has full benefit of everything that has gone on . . . up to the present time," defeated the purpose of the *Collins* instruction by implying that the jury should not disregard previous deliberations, but instead, start again in order to bring the new juror "up to speed."].)

We conclude the error in failing to properly instruct the reconstituted jury was prejudicial under the *Watson* standard. In addition to the circumstances we discussed above in determining the prejudicial effect of the prosecution's rebuttal examination of character witness Chang, we consider the relatively short time that elapsed between substitution of the alternate juror and the verdict. In *Renteria*, "the jury had deliberated some hours before the substitution [of an alternate juror] was made, but reached a verdict some 30 minutes after it was made. The jury had reported itself at impasse, unable to reach a verdict, at almost the same time the ill juror said she could not continue to serve that afternoon, and was discharged for that reason." (*Renteria, supra*, 93 Cal.App.4th at

pp. 560-561.) Considering, the short time period between substitution of the alternate juror and the verdict, along with certain weaknesses in the prosecution's evidence, the *Renteria* court found the instructional error prejudicial. (*Id.* at p. 561.)

The circumstances here are remarkably similar. After 10 days of deliberation, the court received a note reporting the jury was at impasse and unable to reach a verdict at almost the same time Juror No. 6 asked to be excused for family reasons. The court replaced Juror No. 6 with an alternate juror, and the reconstituted jury reached a verdict after about two and a half hours of deliberation. In the words of the *Renteria* court, "[t]aking all the circumstances into account, including . . . the very short time that elapsed between substitution of an alternate to the jury and the verdict, we cannot say the error was harmless." (*Renteria, supra*, 93 Cal.App.4th at p. 561.)

### III. *Sufficiency of the Evidence to Support the Murder Conviction*

Although we are reversing the conviction of second degree murder, we address the sufficiency of the evidence to support the conviction because the double jeopardy clause precludes retrial if the evidence is insufficient. (*People v. Grant* (2003) 113 Cal.App.4th 579, 584.)<sup>10</sup> "To determine whether there is substantial evidence to support a conviction we must view the record in a light most favorable to conviction, resolving all conflicts in the evidence and drawing all reasonable inferences in support of conviction. We may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable factfinder could find the defendant to

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<sup>10</sup> Our reversal of Sullivan's murder conviction renders it unnecessary to address his other claims of error.

be guilty on the theory presented." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 528-529, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

We are satisfied that substantial evidence supports Sullivan's murder conviction. The evidence shows that Sullivan walked up to Lefler-Panela in Sam's and punched him without provocation. A witness saw Sullivan looking angry and agitated as he uttered a threat to stab Lefler-Panela and took out his knife in the bar. A few minutes later outside the bar, as Lefler-Panela and Hayes were about to enter their vehicle and Lefler-Panela was talking on his cell phone, Sullivan ran toward Lefler-Panela and immediately started stabbing him when they collided. The incident lasted less than a minute and Lefler-Panela never fought back or bit Sullivan. Lefler-Panela bled to death on the scene. When Lefler-Panela's former girlfriend called Sullivan to ask about Lefler-Panela's death the night it happened, Sullivan denied being at Sam's that night. Based on this evidence, the jury could reasonably find Sullivan guilty of second degree murder.

## DISPOSITION

The judgment is reversed as to the second degree murder conviction and the accompanying enhancement. In all other respects the judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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McDONALD, J.